American Express (M) Sdn Bhd v Matthias Chang Wen Chieh

HIGH COURT (KUALA LUMPUR) — SUIT NO S-24–476 OF 2010
PRASAD ABRAHAM J
26 SEPTEMBER 2011

Civil Procedure — Declaration — Application for — Whether defendant was vexatious litigant — Whether defendant should be subject to restraint — Courts of Judicature Act 1964 s 25(2)

It was the plaintiff's case that after it had obtained summary judgment against the defendant for a sum of RM29,338.68 together with costs, the defendant had engaged in a plethora of proceedings challenging the veracity of the summary judgment on the grounds that it was irregular, in that, it was obtained dishonestly for a judgment sum in excess of the amount actually due to the plaintiff. The plaintiff submitted that the defendant's conduct in the trail of proceedings it had instituted against the plaintiff in respect of the summary judgment was sufficient to declare the defendant a vexatious litigant. The plaintiff thus applied by way of the present application pursuant to the Courts of Judicature Act 1964 ('the Act') to have the defendant declared a vexatious litigant and to bar him from instituting any further legal proceedings against it. In response, the defendant applied to strike out the plaintiff's application.

Held, allowing the plaintiff's application:

(1) In determining whether the proceedings were vexatious, the court had to look at the whole sequence of litigation initiated by the defendant. After looking at the history of the litigation in this case, the court was satisfied that the conduct of the defendant in the litigation ensuing from the summary judgment was vexatious and would justify him being declared a vexatious litigant. As such, the defendant should be subject to restraint under the Act (see paras 5–6).

(2) Based on the litigation at hand it was agreed that the plaintiff had satisfied the court that an order pursuant to the Schedule to s 25(2) of the Act and the additional powers of the court, particularly s 17 of the schedule, ought to be made against the defendant (see para 8).

[Bahasa Malaysia summary

Ia adalah kes plaintif bahawa selepas ia memperolehi penghakiman ringkas terhadap defendan untuk sejumlah RM29,338.68 bersama dengan kos, defendan telah memasukkan prosiding yang banyak untuk mencabar

ketepatan penghakiman ringkas atas alasan bahawa ia adalah di luar aturan, di mana, ia diperolehi secara tidak jujur untuk jumlah penghakiman yang berlebihan daripada jumlah yang sebenarnya kena bayar kepada plaintif. Plaintif berhujah bahawa tindakan defendan dalam rangkaian prosiding yang dimulakan olehnya terhadap plaintif berkaitan penghakiman ringkas adalah mencukupi untuk mengisytiharkan defendan litigan yang menyusahkan. Plaintif oleh itu memohon melalui permohonan ini berikutan Akta Mahkamah Kehakiman 1964 ('Akta') untuk mengisytiharkan defendan litigan yang menyusahkan dan menghalang dia daripada melakukan apa-apa prosiding lanjut terhadapnya. Dalam menjawab, defendan memohon untuk membatalkan permohonan plaintif.

Diputuskan, membenarkan permohonan plaintif:

(1) Dalam menentukan sama ada prosiding adalah menyusahkan, mahkamah hendaklah melihat kepada kesemua urutan litigasi yang dimulakan oleh defendan. Selepas melihat kepada sejarah litigasi dalam kes ini, mahkamah berpuashati bahawa tindakan defendan dalam litigasi berikutan daripada penghakiman ringkas adalah menyusahkan dan akan berjustifikasi untuk mengisytiharkan dia litigan yang menyusahkan. Oleh itu, defendan patut disubjekkan kepada halangan di bawah Akta (lihat perenggan 5–6).

(2) Berdasarkan litigasi tersebut ia dipersetujui bahawa plaintif telah memuaskan mahkamah bahawa perintah berikutan Jadual kepada s 25(2) Akta dan kuasa mahkamah tambahan, terutamanya s 17 Jadual, patut dibuat terhadap defendan (lihat perenggan 8).]

Notes

For cases on application for declarition, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2519–2551.

Cases referred to

Bhamjee v Forsdick (No 2) [2003] BPIR 1252, CA (refd)
Langton, Re [1966] 3 All ER 526 (refd)
Sim Kooi Soon v Malaysia Airlines System (No 2) [2011] 4 MLJ 728, CA (refd)
Vernazza, Re [1959] 2 All ER 200, QB (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 17, 25(2)

Prakash Menon (Vanaja Nambiar with him) (Isharidah Ho Chong & Menon) for the plaintiff.
TE Cheah (Manjit Singh with him) (Suhaimi Khor Zulkifli & Chang) for the defendant.

Prasad Abraham J:

[1] Enclosure 1 was an application by the plaintiff to declare the defendant a vexatious litigant pursuant to the Courts of Judicature Act 1964 (Act 91) the said Act and the schedule to s 25(2) of the said Act and the additional powers of the High Court particularly s 17 of the Schedule. Enclosure 5 was an application by the defendant by way of summons in chambers to strike out encl 1.

[2] The plaintiff moves this court to bar the defendant, subject to the leave of a judge from instituting any legal proceedings in court because the plaintiff has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in court. In determining this question the court will have to look at the whole sequence of litigation initiated by the defendant to see whether the defendant fell within the barometers of the said Act bearing in mind, the order being sought is rather draconian in its effects and should be exercised sparingly (see *Re Vernazza* [1959] 2 All ER 200) particularly at p 202 of the report where it was held:

> in determining whether proceedings were vexatious the court must look at the whole history of the matter, not solely at the question whether the pleadings had throughout disclosed a cause of action, and in the present case, so regarded, the order should be granted.

[3] Let me set out the trail of proceedings arising between the plaintiff and the defendant:

(1) On 1.7.2005, the Plaintiff (the Defendant in the Civil suit) had obtained summary judgment based on their counter claim against the Defendant (the Plaintiff in the Civil suit) for a sum of RM29.338.68 together with costs and interest in Kuala Lumpur High Court under Civil suit No.: S3-23-22-2002 (Civil suit).

(2) Being dissatisfied with the decision, the Defendant filed an appeal to the Judge in Chambers and on 7.2.2006; the said appeal was dismissed with costs.

(3) The Defendant further appealed to the Court of Appeal against the said Order.

(4) Before the Appeal in the Court of Appeal was heard, the Defendant filed an application to set aside the Summary Judgment in the Civil suit on the alleged basis that —

  (a) the Summary Judgment and the said Order are both nullities and/or that the Summary Judgment was an irregular judgment as it was obtained dishonestly on the basis that the judgment sum in the Summary Judgment was in excess of the amount actually due to the Plaintiff.

(5) On 23.8.2007, the said application was dismissed with costs. The Defendant

then filed a Notice of Motion for leave to appeal to the Court of Appeal against the said decision. The Motion was dismissed on 19.3.2008.

(6) As for the Defendant's appeal to the Court of Appeal against the said Order, the same was struck out for non compliance with section 68 of the Court Judicature Act 1964.

(7) Having exhausted all legal avenues to set aside the summary Judgment in the Civil suit and refusing to accept the finality of the matter, the Defendant filed a new suit against the Plaintiff and its solicitors under the High Court Kuala Lumpur Civil Suit No.:S7-22-435-3008 (2nd suit).

(8) Through this 2nd suit, the Defendant was attempting to re-open the matter as the prayers sought in the 2nd suit, inter alia, was to set aside the Summary Judgment and the said Order based on the same Allegations raised by the defendant in the Civil Suit, which was heard and determined against him.

(9) The Plaintiff then filed an application to strike out the 2nd Suit under Order 18 rule 19 of the Rules of High Court 1980 and on 7.8.2009, the said application was allowed with costs on a solicitors and client indemnity basis. However, there is an appeal pending against the said decision in the Court of Appeal.

(10) With regard to the Summary Judgment, the Plaintiff had filed a Bankruptcy Notice against the Defendant as the Defendant failed to satisfy the Judgment.

(11) The Defendant filed an Affidavit and Notice of Motion to set aside the bankruptcy Notice. In the said Affidavit and Notice of Motion, the Defendant's raised the same issues i.e. that the Summary Judgment and the said Orders are nullities based on the same allegations which have been judicially decided against him in both the Civil Suit and the 2nd Suit.

(12) The Defendant's said Affidavit and Notice of Motion were dismissed by both the Senior Assistant Registrar and the learned Judge on an appeal.

(13) Beside the above vexatious proceedings, the Defendant has also initiated an action against the officers of the Plaintiff Company based on the same issues and allegations. This Suit is pending disposal.

(14) The Defendant has also lodged a police report against the Plaintiff, its officers and its lawyers and this report is also premised on the same issues and allegations.

[4] The plaintiff submits that the conduct of the defendant in the plethora of proceedings referred to aforesaid, in invariably challenging the veracity of the summary judgment obtained by the plaintiff against the defendant as it was obtained dishonestly as the summary judgment was in excess of what was actually due to the plaintiff most of which have been dismissed by itself should be a ground to make the order to declare the defendant a vexatious litigant.

[5] The defendant in submissions in reply submit that the proceedings in question were instituted by the plaintiff and not the defendant. The defendant was taking steps to defend his position and s 17 of the said Act do not apply.

Looking at the history of litigation in this case and in particular the suit against the plaintiff and its solicitors and having regard to the pleadings therein the defendant has clearly exhibited the hallmarks of persistent vexatious behavior and should be subject to restraint under the said Act (see the decision of the English Court of Appeal in *Bhamjee v Forsdick (No 2)* [2003] BPIR 1252).

[6] The court is satisfied that the conduct of the defendant in the litigation ensuing from the summary judgment entered against the defendant by the plaintiff for a sum of RM29,338.68 is vexatious and would justify the defendant being declared a vexatious litigant. His Lordship Abdul Malik Ishak JCA in delivering the judgment of the Court of Appeal extempore in the case of *Sim Kooi Soon v Malaysia Airlines System (No 2)* [2011] 4 MLJ 728 said and I quote:

> (1) What is the hallmark of a vexatious litigant? The claimant who sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with variations, is termed as a vexatious litigant.
>
> (2) And a vexatious proceeding is one where the vexatious litigant had little or no basis in law and its effect was to subject the opposing party to inconvenience.

[7] I refer also to the case of *Re Langton* reported in [1966] 3 All ER 526 and to the judgment of Lord Parker CJ at p 577 and I quote:

> However, ever since then it is perfectly clear that the litigant has been attempting to re-litigate, in one form or another, that very matter which was decided by Rees J, and by the Court of Appeal, who dismissed an appeal from the judge. I find it unnecessary to go through these proceedings in detail; there have been, following the original action, some ten actions over the last eight years. Those actions have taken various forms; they have taken the form of attempting to set aside the judgment of Rees J on the ground that it was obtained by fraud; there have been attempts to re-litigate the matter by trying to set aside orders made in the proceedings by the registrar, and there has been a proceeding to set aside the order originally made, before all this litigant commenced, by Danckwerts J in 1957. Finally, action has been instituted claiming that all the judgments and orders of the court in all the s preceding actions in the matter be set aside as being obtained by fraud. Some of those actions have been dismissed and are at an end. Others are in various stages, but it is perfectly clear that the litigant has been habitually and persistently and without any reasonable ground instituting vexatious legal proceedings in an attempt to re-litigate the matter which was fully dealt with in the first action. Looking at the whole history of this matter, the general character of the proceedings and the results, that conclusion is inevitable.

[8] To my mind and confining myself to the litigation at hand, without taking into account any extraneous matters, I agree the plaintiff has satisfied the

court that an order pursuant to s 17 of the additional powers of the court pursuant to s 25(2) of the said Act against the defendant be made.

[9] I was of the view, encl 1 particularly prayer 1 was rather far reaching and I confined the order that I made to matters ensuing from the summary judgment obtained by the plaintiff against the defendant.

[10] Counsel for the defendant sought to submit that the court should dispense with the order having to be gazetted pursuant to s 17 of the additional powers of the High Court under the said Act unlike the position in the United Kingdom s 17 is mandatory in its requirement for gazetting and I so ordered. It is for these reasons that the court made the orders it did on 28 July 2011.

Plaintiff's application allowed.

Reported by Kohila Nesan